1977

Don S. Smith And Brigham H. Smith v. R.L. War v. J.H. Ehlers, Evelyn P. Boyce. Lois P. Connell : Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

DON S. SMITH and BRIGHAM H. SMITH,

Plaintiffs,

-vs-

R. L. WARR,

Defendant and Cross-complainant and Appellant,

Case No. 14565

-vs-

J. H. EHLERS, EVELYN P. BOYCE, LOIS P. CONNELL,

Defendants and Cross-defendants and Respondents.

BRIEF OF APPELLANT

APPEAL FROM A JUDGMENT AGAINST CROSS-DEFENDANTS IN THE THIRD JUDICIAL DISTRICT COURT, IN AND FOR SALT LAKE COUNTY, STATE OF UTAH, THE HONORABLE JAMES S. SAWAYA, JUDGE, PRESIDING.

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BRIEF OF APPELLANT

STATEMENT OF THE NATURE OF THE CASE

Appellant appeals from a judgment in his favor and against respondents based on a breach of two real estate contracts.

DISPOSITION IN THE LOWER COURT

Appellant's cross complaint against respondents was tried without jury before the Honorable James S.

Sawaya on January 16, 1976 at which time the lower court held in favor of appellant but limited recovery to appellant's out-of-pocket loss and denied appellant's request for attorney's fees and costs of court.

RELIEF SOUGHT ON APPEAL

Appellant seeks an increase in the judgment by using as the measure of damages the benefit of the bargain rule or, in the alternative, the true amount paid by appellant to respondents. In addition appellant seeks a reversal of the lower court's order denying attorney's fees and court costs.

STATEMENT OF THE FACTS

The property in question was acquired by tax deed dated June 6, 1949 by Rennold Pender and respondent J. H. Ehlers. Mr. Pender died in 1963 and his estate, including the property in question, was distributed to his two daughters, respondents Evelyn P. Boyce and Lois P. Connell, pursuant to a Decree of Distribution dated November 29, 1966. (Findings of Fact and Conclusions of Law supporting the Judgment entered for plaintiffs below.)

Mr. Boyce, the husband of respondent Boyce, acted as the agent for respondents Boyce and Connell in administering the estate of Mr. Pender from the time of his death in 1963 to the closing of the estate in 1966.

(Tr. p. 37.) This included the duty to pay the taxes on all the property in the estate, including the property in question. (Tr. p. 39.)

On August 20, 1973 appellant purchased from all these respondents by virtue of two Uniform Real Estate Contracts the property in question. Within four months thereafter the plaintiffs in the lower court case began their action for adverse possession against the respondents but did not join appellant as a party defendant until June 16, 1975. Until then appellant did not know that a lawsuit had been filed. (Tr. pp. 51-52.) When appellant was served, respondents refused to take his defense. (Tr. p. 52.) Appellant was therefore separately represented in the lower case action. At the conclusion of that case a judgment for plaintiffs was granted. No appeal was taken from that judgment.

Appellant in his answer also filed a cross complaint action against respondents and the hearing on that claim was deferred by the court until after the judgment for the plaintiffs was entered. Shortly thereafter the cross complaint of appellant against respondents was heard by the court. At the time of the hearing of the cross complaint, appellant was prepared to pay the remaining amount due under the contracts, which amount could be available within a day or two. (Tr. pp. 52, 58.)

Judgment was entered for appellant based on the

theory of out-of-pocket loss. Because of certain claimed difficulties with the judgment as prepared by respondents and entered by the court, appellant made a timely objection to the findings of fact, conclusions of law, and judgment, which objections the lower court denied. Thereafter this appeal was taken.

ARGUMENT

POINT ONE

THE TRIAL COURT ERRED IN FAILING TO GIVE CROSS-COMPLAINANT DAMAGES FOR CROSS-DEFENDANT'S BREACH OF THE UNIFORM REAL ESTATE CONTRACTS IN THE AMOUNT OF THE MARKET VALUE OF THE PROPERTY AT THE DATE OF THE BREACH LESS THE AMOUNT REMAINING TO BE PAID ON THE CONTRACTS.

The court below determined that for vendors-respondents' breach of contract the purchaser-appellant was entitled to damages under the out-of-pocket loss rule, or the amount paid on the contract. However, while it is true that there is a division of authority as to the appropriate measure of damages when it becomes impossible for a vendor to convey real property to a purchaser, (see 48 ALR 19-24; 68 ALR 140-141), the clear position of Utah is that in such situations the benefit of the bargain rule applies to determine the measure of damages. Bunnell v. Bills, 13 Ut.2d 83, 368 P.2d 597 (1962) (hereinafter Bunnell). With regard to this rule this Court held in Bunnell at 601:

> The measure of damages where the vendor has breached a land sale contract is the market value of the property at the time of the breach less the contract price to the vendor.

This formula for determining damages when the vendor fails to convey property to the purchaser is the so-called "American" rule. 10 Villanova Law Review 557 (1965). It is the rule in a good number of western jurisdictions, some of them relying on Bunnell as authority. Manson v. Manson, 529 P.2d 1343 (Colo. App. 1974) (citing Bunnell as authority); Bennett v. Moring, 522 P.2d 741 (Colo. App. 1974); Aboud v. Adams, 84 N.M. 683, 507 P.2d 430 (1973)(citing Bunnell as authority); Conely v. Davidson, 35 N.M. 173, 291 P. 489 (1930); Freedman v. Cholick, 233 Or. 569, 379 P.2d 575 (1963); Crahane v. Swan, 212 Or. 143, 318 P.2d 942 (1957). See also Williams v. Havens, 92 Ida. 439 444 P.2d 132 (1968); Higgins v. Belson, 66 Ida. 736, 168 P.2d 813 (1946). In addition, many courts in other regions have also adopted this rule. 92 C.J.S. Vendor and Purchaser, § 592-593; Williston on Contracts § 1399 at 524 (3d ed. 1968).

Some courts have suggested that recovery under the benefit of the bargain rule requires a showing of bad faith. On the other hand, many courts have explicitly or impliedly rejected any requirement of bad faith in order for a vendee to recover the benefit of the bargain. Indeed, none of the western jurisdictions cited above

require such a showing. The reasons for not applying a bad faith test are set out in Crahane v. Swan, supra at 948-9, and paraphrased in 77 Am. Jur. 2d Vendor and Purchaser, § 523:

> The rule is well established that where the vendor has title, and for any reason refuses to convey it, as required by the terms of the agreement, he shall respond in damages, and make good to the vendee whatever he may have lost by reason of the breach. So far as money can do it, the vendee must be placed in the same situation with regard to damages as if the contract had been specifically performed; and the measure of such damages will ordinarily be the difference between the contract price and the value of the property at the time of the breach. This has always been regarded as the true measure of damages in actions on contracts for the future delivery of marketable commodities, and it makes no difference in principle whether the contract be for the sale of real or personal property. In both instances the vendee is entitled to have the thing agreed for at the contract price, and to sell it himself at its increased value, and if it be withheld the vendor should make good to him the difference.

Nevertheless, even if Utah were to require bad faith on the vendor's part in order to allow a purchaser to recover the loss of the benefit of the bargain, because of the facts in this case the appellant would still be entitled to the market value of the land less the contract price, (or if part of the contract price has been paid, as was the circumstance in the instant case, the market value of the property less the unpaid purchase money. 92 C.J.S. Vendor & Purchaser § 596.) The rule of bad faith in this type of case has been succinctly stated

in the California case of Shaw v. Union Escrow and Realty Co., 53 Cal. App. 66, 200 P. 25, 26 (1921) when it was announced:

> It is not necessary in order to establish bad faith . . . that the vendor be shown to have refused to go on with the transaction because of some gain which would have accrued to him. It is sufficient if he refuses to convey, where, through his own negligence, he has put it out of his power to fulfill the obligations of his contract. (emphasis added)

The California court then went on to characterize the bad faith requirement as an anomaly stating that the accepted rule was that a person is entitled to have in damages the worth of that which would have been rendered him under the full performance of the contract, Shaw v. Union Escrow and Realty Co., supra.

In the instant case, respondents Connell, Boyce, and Ehlers were negligent in allowing the plaintiff's Smith to adversely possess the land in question. The fact that the property was adversely possessed is in and of itself evidence of that negligence. The requirements of adverse possession are extremely difficult to meet. Yet the lower court found with regard to those requirements that the taxes for the years 1952-1954, and 1959-1966 had been paid by the plaintiffs below and that those plaintiffs had "exclusive, complete, actual, open, notorious, hostile and continuous undisputed possession" of the property in question. (Findings of Fact and Con-

clusions of Law.) This could not have occurred in the absence of negligence.

The conduct of respondents as borne out by their testimony further shows their negligent management and control of the property in question. All three had ample opportunity to verify payment of the taxes on said property, (Tr. p. 39) to inspect the property to determine who was farming it, (Tr. pp. 45, 46) and to generally review the conditions of the property. Ehlers has held title since 1949, and Boyce and Connell obtained control of the late Mr. Pender's interest in the property in 1963 (Tr. p. 37). It is undisputed that the property has been farmed consistently either by plaintiffs or under plaintiffs control and direction during the entire time defendant Connell, Boyce and Ehlers have held title to the same. (Judgment and Decree.) Nevertheless, there was never once a demand made on the Smiths or those farming under them for any kind of a lease payment or to cease and desist their farming practices. (Tr. p. 45) On the other hand, Warr purchased through a realtor and saw and purchased the land in the fall at a time when it was difficult to determine if the land was being farmed and if so by whom. (Tr. pp. 46, 53-54) Therefore, at the time of entering into the contract the sellers had been in a position for many years to make certain they had good title to the land in question whereas the buyer was depending

entirely upon the sellers to give him good title. That the sellers cannot now give good title is a clear case of negligence, or in other words, bad faith on their part. Hence even using the bad faith requirement, the benefit of the bargain damage rule applies in this case.

POINT TWO

THE COURT BELOW ERRED IN ITS DETERMINATION OF THE AWARD UNDER THE OUT-OF-POCKET LOSS RULE.

It is appellant's position that this Court is to be guided by the benefit of the bargain rule. Nevertheless, if this Court were to adopt the out-of-pocket loss rule as the lower court did, it should nevertheless correct the errors made by the lower court in applying that rule.

The court below gave judgment to the appellant from respondent Ehlers for $4,442.65 but only $3,807.15 from respondents Connell and Boyce. (Judgment and Decree on Cross-Complaint.) The clear testimony is that respondents Connell and Boyce have been paid by appellant the sum of $5,067.65. (Tr. p. 48.) Moreover, counsel for Boyce and Connell in paragraph (8) of the response memo to appellant's Objections to Findings of Fact, Conclusions of Law, and Judgment Proposed stated that the basis for the figure used in that judgment "was founded on information furnished cross-defendants by office or accountant

for cross-plaintiffs, and in view of facts now available, correctable." (Emphasis added.) Therefore, the damages should be increased by $1,260.50 if the out-of-pocket loss rule is applied.

The judgment entered below provided no interest from the dates of the payments by the appellant to the respondents up to the date of judgment. A fair amount to be awarded appellant as interest on the amounts paid would be 8 percent per annum. Counsel for respondent Ehlers and counsel for respondents Connell and Boyce, in their responses to appellant's Objections to Findings of Fact, Conclusions of Law, and Judgment Proposed, both admit that appellant is entitled to 6 percent from the time of the payments until judgment. It is submitted that under the out-of-pocket loss rule appellant is entitled to at least 6 percent interest from the date of his payments up to the time of judgment. In view of current interest rates, however, a more appropriate amount would be 8 percent.

With regard to other appellant's objections to the court's rulings below, appellant directs the Court to its Objections to Findings of Fact and Conclusions of Law and Judgment and Decree on Cross-complaint of R. L. Warr which was filed below and which has been made a part of the record on appeal.

POINT THREE

APPELLANT IS ENTITLED TO ATTORNEY'S FEES.

Under either theory of recovery, whether benefit of the bargain or out-of-pocket loss, appellant is entitled to his attorney's fees. The court below found that the respondents were in breach of their Uniform Real Estate Contracts under date of August 20, 1973, "for their inability and failure to deliver possession of the premises and their obvious inability to convey title to the premises free and clear of all encumbrances." The court below, however, denied the payment of attorney's fees without any further explanation.

The contracts in question under paragraph 21 specifically provide for an attorney's fee if there should be a default "in any of the covenants or agreements contained herein." That contract clause provides that those fees "which may arise or accrue from enforcing this agreement, or in obtaining possession of the premises covered hereby, or in pursuing any remedy provided hereunder or by the statutes of the state of Utah whether such remedy is pursued by filing a suit or otherwise" must be paid by the defaulting party. (Emphasis added.) It is clear and obvious that appellant, both in defending the initial claim of adverse possession and further in seeking recovery on his cross-complaint against respondents, has incurred substantial attorney's fees which contractually must be paid for by the respondents.

POINT FOUR

APPELLANT IS ENTITLED TO HIS COSTS OF COURT.

The court below in its judgment ordered that each side was to bear its own costs. The general rule is, however, that the prevailing party, as a matter of course, should normally be awarded its costs. Rule 54(d) of the Utah Rules of Civil Procedure. Appellant was the prevailing party below and there is no indication by the court why it should not be awarded its costs. Further, again referring to paragraph 21 of the Uniform Real Estate Contracts in question, the respondents by contract agreed to pay "all costs and expenses." This would include normal court costs. Therefore, appellant is entitled to his court costs.

CONCLUSION

Appellant contracted to buy a piece of property from respondents which, except for the mismanagement and lack of control over that property by respondents, would have resulted in his having today a piece of property worth much more than what he paid for it. Appellant should not have to bear that loss. The loss is not speculative, but rather, has been clearly testified to. In fact, the property in question has since been sold by the plaintiffs. This Court should therefore remand the case to the lower court with an instruction that the lower court is to award appellant damages based on the benefit of the bargain rule and that the value of the property

is to be measured as of the time of the breach.

It would be manifest injustice to simply allow only the out-of-pocket losses of appellant. Even so, if that is to be the rule, the lower court has not sufficiently provided for that loss and that amount should be increased from $8,249.80 to $9,510.30. Further, there would not be true restoration of out-of-pocket losses if appellant were not entitled to interest from the time of the payments until judgment at the rate of 8 percent or, as a very minimum, at the rate of 6 percent.

Finally, appellant has been required to defend the action against the lower court plaintiffs. It further became necessary to bring this action against the respondents. The contract which was signed clearly provides for attorney's fees in such a case, whether this Court adopts the benefit of the bargain rule or the out-of-pocket loss rule. Therefore this case should also be remanded to the lower court with an instruction that appellant is to be awarded his attorney's fees.

Respectfully submitted,

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